(1)

No. 95-1446

Supreme Court, U.S.
FILED
MAR 11 1996
CLERK

In The

Supreme Court of the United States

October Term 1995

THOMAS JOSEPH CURTIS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

R. P. Cornelius
Counsel of Record
ADAMO & CORNELIUS
440 Louisiana Avenue
Suite 1515
Houston, Texas 77002
(713) 237-8380

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

25 pp

QUESTIONS PRESENTED

1. Whether the Fifth Amendment's guarantee of due process is violated when a person is convicted of False Statement On A Loan Application, Title 18, United States Code, Section 1014, and there is no evidence that a false statement was knowingly made with the intent to influence the bank's actions.

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

TABLE OF AUTHORITIES iii

OPINIONS BELOW. 2

JURISDICTION 2

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED. 2

STATEMENT OF THE CASE. 3

A. The Proceedings Below 3

B. The Facts 4

C. The Appeal. 9

REASONS FOR GRANTING THE WRIT. 10

CONCLUSION 19

TABLE OF AUTHORITIES

CASE AUTHORITY

Case	Page
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942)	11
Jackson v. United States, 443 U.S. 307, 99 S.Ct. 2781 (1979)	10, 12
United States v. Attick, 649 F.2d 61 (1st Cir.), cert. denied, 454 U.S. 861, 102 S.Ct. 318 (1981)	15
United States v. Baum, 974 F.2d 496 (4th Cir. 1992)	18
United States v. Bell, 535 F.2d 886 (5th Cir. 1976)	16
United States v. Beuttenmuller, 29 F.3d 973 (5th Cir. 1994)	18
United States v. Bonnette, 663 F.2d 495 (4th Cir. 1981)	12
United States v. Brown, 674 F.2d 436 (5th Cir. 1982)	14
United States v. Devoll, 39 F.3d 575 (5th Cir. 1994)	12
United States v. Diogo, 320 F.2d 898 (2d Cir. 1963)	15

United States v. Duncan, 598 F.2d 339
(4th Cir.), cert. denied, 444 U.S. 871,
100 S.Ct. 148 (1979) 16

United States v. Goss, 650 F.2d 1336
(5th Cir. 1981) 18

United States v. Johnson, 585 F.2d 119
(5th Cir. 1978) 13

United States v. Kramer, 500 F.2d 1185
(10th Cir. 1974) 14, 15

United States v. Krown, 675 F.2d 46
(2nd Cir. 1982) 16

United States v. Rapp, 871 F.2d 957
(11th Cir. 1989) 16

United States v. Rothberg, 954 F.2d 217
(4th Cir. 1992) 18

United States v. Shaid, 730 F.2d 225
(5th Cir. 1984) 13

United States v. Whaley, 786 F.2d 1229
(4th Cir. 1986) 12

RULES AND STATUTES

Page

Fed. R. App. P. 4(b) 3

Fed. R. App. P. 34(a) 20

Title 18 U.S.C. 2 4

Title 18 U.S.C. 152 3

Title 18 U.S.C. 1014 . . . . . .3, 10, 12

Title 18 U.S.C. 1344 . . . . . .3, 13

Title 18 U.S.C. 1956(a)(1)(B)(i) 4

Title 18 U.S.C. 3231 3

Title 28 U.S.C. 1291 3

Thomas J. Curtis, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court Of Appeals For The Fourth Circuit in this case.

OPINION BELOW

By its unpublished opinion dated November 14, 1995, the United States Court Of Appeals For The Fourth Circuit affirmed Mr. Curtis' conviction False Statement On A Loan Application. On December 11, 1995, the United States Court Of Appeals For The Fourth Circuit denied Mr. Curtis' Motion For Rehearing With Suggestion For Rehearing En Banc.

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor be deprived of life, liberty, or property, without due process of law ...

18 United States Code, Section 1014, provides in pertinent part:

> Whoever knowingly makes a false statement or report, ... for the purpose of influencing in any way the action of ... any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, ... upon any ... loan, ... shall be fined not more than

$1,000,000.00 or imprisoned not more that 30 years, or both.

STATEMENT OF THE CASE

This is an appeal from a conviction by jury of False Statement On A Loan Application in the United States District Court for the Western District of Virginia, final judgment of conviction entered on August 12, 1994, by the Honorable Jackson L. Kiser, Judge of the United States District Court for the Western District of Virginia. The District Court had jurisdiction pursuant to title 18 United States Code, Section 3231. [App. A7] Timely notice of appeal was filed by petitioner Thomas Joseph Curtis on August 11, 1994, and entered on August 12, 1994, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. The United States Court Of Appeals For The Fourth Circuit affirmed petitioner's conviction in an unpublished opinion dated November 14, 1995. [App. A1-A5] Petitioner's Motion For Rehearing With A Suggestion Of Rehearing En Banc was denied on December 11, 1995. The United States Court Of Appeals For The Fourth Circuit had jurisdiction pursuant to Title 28 United States Code, Section 1291. [App. A6]

A. The Proceedings Below

On December 9, 1994, a 21-count Superseding Indictment was returned against appellant in the United States District Court For The Western District of Virginia, At Roanoke, and transferred to the Charlottesville Division. [App. A13-A33] The indictment originally alleged the following: two counts of Bank Fraud, Title 18, United States Code, Section 1344, one count, Count Number 2, of False Statement On A Loan Application, Title 18, United States Code, Section 1014, twelve counts of Bankruptcy Fraud, Title 18, United States Code, Section 152, and six counts of Money

Laundering, Title 18, United States Code, Section 1956 (a)(1)(B)(i) and 2. [App. A13-A33]

On April 11, 1994, a hearing was held on appellant's Motion To Dismiss Counts 4-21 and the Court granted the motion as to counts 6-20 and dismissed them. Trial then began before a jury on the remaining counts.

On April 15, 1994, at the conclusion of the government's case-in-chief, and again on April 19, 1994, at the closing of all evidence, the Court denied appellant's Motions for Judgment of Acquittal. [App. A75-A85]

On April 22, 1994, the jury convicted appellant on one count, Count Number 2, of False Statement On A Loan Application, and acquitted him on all other counts except one, to which they could not reach a decision. The government moved for a mistrial on the one count to which the jury could not reach a decision and later, on August 3, 1994, the government moved to dismiss that one count and such motion was granted by the Court. Appellant was sentenced on July 29, 1994, to 72 hours confinement and 5 years supervised release. Appellant's timely Notice Of Appeal was received by the United States Clerk on August 8, 1994, filed on August 11, 1994, and entered on August 12, 1994.

B. The Facts

B. J. Walter, called by the government, testified that he had represented a bank in Texas in a 3.8 million-dollar law suit against appellant in 1987. [App. A34] He testified that the lawsuit was settled in January of 1987 with appellant agreeing to either pay the bank $500,000 in three payments, or accept a two million-dollar judgment in favor of the bank. That appellant did not make the initial payment of $300,000 due on May 20, 1987, and a judgment was entered on May 21, 1987. [App. A36] Mr. Walter testified that appellant did not have a judgment against him on this matter at any time in 1986 and

therefore had no reason to include on a loan application or financial statement this two million-dollar judgment. [App. A41-A43]

Mr. Walter further testified that appellant's March 31, 1987, financial statement did list a $500,000 contingent liability for civil disputes but did not list the 3.8 million-dollar lawsuit, which, in his opinion, was a contingent liability. [App. A39-A40]

Mr. Walter testified that the first notice to appellant of the judgment was dated November 24, 1987, and he did not know when it was recorded, possibly as late as 1988. [App. A44]

The government offered into evidence a Settlement Agreement [App. A86-A95] and Agreed Judgment [App. A94-A95], both signed by appellant on January 21, 1987. These two instruments clearly reflect that appellant had agreed to settle the lawsuit in Texas with Interfirst Bank Southwest, for $500,000 with payments to begin on May 20th, 1987, but, the agreement called for a two million-dollar judgment if appellant were not able to make the payments. Appellant did not make the payments as agreed and judgment was taken May 21st, 1987. [App. A96-A99]

Timothy Riggle, called by the government, testified that he had been in the employ of appellant and while an employee he applied for and received a $112,000 loan from Guaranty Savings and Loan to build a house on State Route 648 in Charlottesville, Virginia. [App. A45-A46]

Susan Clayton Gallion, called by the government, testified that she was the Loan Closing Manager and Servicing Supervisor at Guaranty Savings and Loan. [App. A47-A48]

Ms. Gallion testified that in July of 1987 appellant called and said that Mr. Riggle was no longer in his employ and he wanted to bring Mr. Riggle's loan current, which was in default, and convert it to permanent financing. [App. A48] She further testified that on July 28th, 1987, appellant paid all past due interest. [App. A49-A50]

Ms. Gallion further testified that she reviewed appellant's loan application and on that loan application appellant indicated that he had no outstanding judgments against him. Further, in response to the question, are you a party to any lawsuits, appellant answered, "general business lawsuits, if any," and referenced his financial statement, dated March 31, 1987. [App. A118] This financial statement included a $500,000 contingent liability for any unresolved civil lawsuits. [App. A122-A128] Ms. Gallion testified further, that they, Guaranty Savings and Loan, were put on notice of lawsuits. [App. A51]

Ms. Gallion testified that the loan never closed because appellant did not come up with the closing funds. [App. A52] Guaranty proceeded to foreclosure and the property was sold on the courthouse steps on February 28th, 1988 [App. A49] for the amount of $114,222.85. [App. A55] She further testified that even though the property sold for more than the face value of the loan there was a deficiency of $7,700 due to past interest and attorney fees that was paid by appellant. [App. A54]

Ms. Gallion's testimony concluded with the following exchange:

> Q. Had the loan closed, was Mr. Curtis going to get any money?
>
> A. No. sir.
>
> Q. If you-all would have funded the loan and Mr. Curtis would have been -- obtained control of ownership of that property, and if he would have sold it in the future, no matter what he would have sold it for, you would have obtained your first lien position and gotten your $112,000 back; correct?
>
> A. That is correct.

Q. Okay. Am I fair in saying that on this entire transaction every dime that was paid, either for the loan fees or interest or whatever; any money that was paid you, it was paid by Mr. Curtis?

A. That is correct.

Q. Now, the -- you never made him the loan. In fact, the house went into foreclosure, was sold, the bank got their money back minus -- the bank got their money back including whatever back interest, or attorney fees, or expenses you had correct?

A. That is correct.

Q. Okay. Let me ask you a question. Does it appear to you that Mr. Curtis was trying to cheat the bank out of any money in these transactions?

A. No, it does not. [App. A56-A57]

Steven Stacy, called by the government, testified that he was the vice president in charge of mortgage lending at Guaranty Savings and Loan.

Mr. Stacy testified that he had done credit checks on appellant and knew of several outstanding judgments and other financial problems, "slow pays and no pays". [App. A60] But he did not know about a 2 million-dollar judgment against appellant. [App. A59]

Mr. Stacy further testified that Guaranty Savings and Loan was very heavily involved with appellant's finances and very interested in keeping up with what was going on with appellant. [App. A61]

On cross examination he was shown a February 27, 1986, newspaper article from The Daily Progress, the largest newspaper in Charlottesville, which also contained appellant's picture, and which Mr. Stacy admits would have caught his

attention. The newspaper article was read to the jury and clearly stated that appellant was being sued in Texas for approximately 4 million-dollars but appellant believed he would win the lawsuit. [App. A61-A62, A131-A138]

At the conclusion of Mr. Stacy's testimony he was asked the following questions and gave the following answers:

Q. Tell the ladies and gentlemen how Mr. Curtis could have cheated the bank out of any money in this transaction.

A. I don't think the bank felt that we could have last (lost) any money on this transaction because we always --

Q. But you're not confined by what the bank felt. You've got hindsight as (that's) 20-20. You can look back on the plot or anything you want to. Tell them how Mr. Curtis could have cheated the bank out of any money in this transaction.

A. I don't believe he could have.

Q. I want to know how he could have cheated the bank out of any money. He's not on trial for the Keswick venture. He's not on trial for that. He's only on trial for trying to cheat the bank out of, out of $112,000; okay? So tell us how he could have cheated the bank out of $112,000.

A. I don't think he could have. [App. A66-A67]

M. Clifton McClure, an attorney called by the government, testified that he received the (undated) [App. A116-A120] loan application and No Substantial Change In Financial Condition form, dated 12/7/87, from appellant on

December 4th, 1987. [App. A67-A69, A121] Four days later he sent them to the bank. [App. A68]

He further testified that the bank was anxious to close the loan because it was delinquent and the bank examiners were putting a lot of pressure on them to do something about it. [App. A60-A70]

Mr. McClure knew that appellant had a lawsuit pending in Texas. [App. A71] But, he did not find out about the judgment until some time in 1988, when he was doing some title search, and he believes he told appellant about it. [App. A71-A72]

Mr. McClure further testified that the judgment could not have affected the bank's lien, as it was prepared. If the loan had closed, the land trust had prepared a deed to Tom and Paulette Curtis as tenants by entirety, and with tenants by the entirety the property is not subject to the debts of one party. [App. A71-72]

Mr. McClure further testified that appellant's financial statement was "unaudited," which means that a certified public accountant has not audited the figures that are on the statement. [App. A72]

S. A. Carl Bond, called by the government, testified that he works for the State Police of Virginia and was assigned the investigation of this case. He further testified that he first heard of appellant in July of 1989. [App. A73]

Officer Bond testified that he found, in appellant's files, a letter dated July 15th, 1987, that indicated that a judgment had been taken against appellant, on July 14th, 1987, for $30,000 and that this judgment seemed inconsequential due to the judgment of Interfirst Bank Southwest, (which was the two million-dollar judgment). [App. A74, A129]

C. The Appeal

On appeal to the United States District Court Of Appeals For The Fourth Circuit, Mr. Curtis argued that the

evidence was not sufficient to convict him of knowingly making a false statement on a loan application for the purpose of influencing the bank's actions. The United States Court Of Appeals For The Fourth Circuit rejected this argument holding that Mr. Curtis knowingly made a material false statement on his loan application and that the false statement had the capacity to influence the bank's lending decision.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit decision presents an issue worthy of this Court's review: (1) whether the Fifth Amendment's guarantee of due process is violated when a person is convicted of False Statement On A Loan Application, Title 18 United States Code, Section 1014, and there is no evidence that a false statement was knowingly made with the intent to influence the bank's actions. In addressing this issue, the United States Court Of Appeals For The Fourth Circuit has decided important questions of federal law in a way that conflicts with relevant decisions of this Court, as well as other United States Courts Of Appeals.

I. THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS IS VIOLATED WHEN A PERSON IS CONVICTED OF FALSE STATEMENT ON A LOAN APPLICATION, TITLE 18 UNITED STATES CODE, SECTION 1014, AND THERE IS NO EVIDENCE THAT A FALSE STATEMENT WAS KNOWINGLY MADE WITH THE INTENT TO INFLUENCE THE BANK'S ACTIONS.

In Jackson v. Virginia, 443 U.S. 306 (1979), this Court stated:

> "[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no

> person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. [This] doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact-finder will rationally apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one based upon 'reason.' Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge setting as a jury ... [S]uch an occurrence has traditionally been deemed to require reversal of the conviction."

Jackson, 443 U.S. at 316-17. The burden of proving guilt beyond a reasonable doubt establishes a fundamental and substantive constitutional standard. The jury in the instant case failed to apply rationally the reasonable doubt standard to the facts in evidence. Because the evidence did not establish beyond a reasonable doubt that Mr. Curtis knowingly made a false statement to the bank with the intent to influence the bank's actions, his conviction violated the due process guaranteed by the Fifth Amendment and must therefore be reversed.

The standard of review in cases challenging sufficiency of the evidence is evidence viewed in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942). The reviewing appellate court is to resolve all inferences and credibility

determinations in favor of the jury's verdict. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979).

However, in the instant case no other inference can be drawn from this evidence other than appellant's innocence.

There are four essential elements to prove beyond a reasonable doubt in a section 1014 case: (1) false statement to federally insured institution; (2) for the purpose of influencing the institution's action; (3) statement was false as to a material fact; and (4) false statement was made knowingly. United States v. Whaley, 786 F.2d 1229 (4th Cir. 1986); and United States v. Bonnette, 663 F.2d 495 (4th Cir. 1981).

In the instant case there is no issue as to element number (1), appellant concedes that the institution was federally insured. However, appellant contends that the evidence is insufficient to prove the other elements.

A clear understanding of the scope and purpose of Title 18, United States Code, Section 1014 is necessary.

Appellant cites the recent Fifth Circuit case of United States v. Devoll, 39 F.3d 575 (5th Cir. 1994). In Devoll, the government argued that section 1014 did not require proof that a false statement was for the purpose of influencing a financial institution in connection with its lending activities. After reviewing the legislative history and application of section 1014, the Court held,

> "With this background we are not persuaded that the statute imposes liability whenever a defendant's false statement was intended to interfere with any activity of a financial institution; such a broad interpretation of section 1014 presumably would encompass fraud or false representations having nothing to do with financial transactions ..."

Here, as is demonstrated by the record, appellant was merely attempting to take the institution out of a bad loan,

either by taking over the loan himself or by allowing the institution to foreclose on the property and then paying off any deficit. Appellant did not care if the institution approved his loan or not, nor was he seeking to profit from the situation. No other inference can be drawn from the facts.

In carefully examining the evidence, appellant argues that it is only his intent, and not that of the bank officers, that is in issue here. United States v. Johnson, 585 F.2d 119 (5th Cir. 1978); and United States v. Shaid, 730 F.2d 225 (5th Cir. 1984). The only possible conclusion as to appellant's intent to be drawn from this evidence must be that appellant obviously had no intent to cheat the institution. In fact, appellant was acquitted by the jury of Count 1, the allegation of bank fraud, Title 18, United States Code, Section 1344, which count required a finding of intent to defraud and was based on exactly these same facts.

The facts established that appellant was being sued in Texas by a bank for 4 million-dollars. That appellant entered into a settlement of that suit, on January 21, 1987, where he was to pay the bank $500,000 according to a certain payout schedule. When he did not make the payments, judgment was rendered against him on May 21, 1987, as agreed in the Settlement Agreement. [App. A86-A90]

The facts do not establish exactly when, or by whom, appellant actually became aware that the judgment in Texas had been taken against him. Appellant provided the institution with at least two financial statements, one dated March 31, 1986 [App. A100-A107] and one dated March 31, 1987. [App. A122-A128] In each of the financial statements appellant references the institution to a $500,000 contingent liability for possible civil suits.

Appellant applied for this loan and at some time filled out a loan application, although the loan application is undated. [App. A120] However, both Ms. Gallion, the loan closing manager, and Mr. Stacy the vice president for mortgage lending, admit they were put on notice of lawsuits

and Mr. Stacy clearly admits to knowledge of judgments, and the loan application itself refers to general business law suits. [App. A118]

Additionally, the entire story of appellant's four million-dollar lawsuit in Texas with Interfirst Bank Southwest was in the Charlottesville newspaper and Mr. Stacy admits that due to the institution being so involved financially with appellant something like this newspaper story would have certainly caught his attention. [App. A61, A131-138]

According to Mr. McClure, the institution was anxious to close the loan and allowed appellant to simply attach a No Substantial Changes statement to his financial statement and did not require a new financial statement. [App. A69-A71, A121]

These facts are not dissimilar to the facts of United States v. Brown, 674 F.2d 436 (5th Cir. 1982), where that defendant submitted a financial statement that misrepresented his financial situation in two significant respects, but the financial statement had been made three months prior to his loan request. In Brown, the Court held,

> "It would be with great misgivings that we would advance onto the slippery slope presented by countenancing a criminal conviction based on bygone misrepresentations made on another occasion and reposing in a customer's file. Especially is this so when all questions of the backing of the law's sanction for the loans of February 7, and March 2, 1977, could have been foreclosed by simple demands by the bank officer for current information."

These facts are also similar to the facts in United States v. Kramer, 500 F.2d 1185 (10th Cir. 1974), where a clearly false financial statement was presented to a bank along with a loan request, but where that customer had previously

submitted four other financial statements and the bank clearly did not consider the financial statement in question. In Kramer, the Court held, "Finally, sufficient evidence does not exist by which a jury could find that the financial statement was submitted to the bank for the purpose of influencing approval of the loan. A financial statement was not necessary, as a current one already was on file with the bank".

At the heart of the government's case is their contention that appellant's No Substantial Changes statement is a false statement, made with the intention that the institution be influenced by it. To this appellant argues that the statement is the literal truth and appellant can not be convicted of making a false statement if it is literally true. United States v. Diogo, 320 F.2d 898 (2d Cir. 1963); United States v. Attick, 649 F.2d 61 (1st Cir.), cert. denied, 454 U.S. 861, 102 S.Ct. 318 (1981).

The undisputed facts are that in January appellant had settled his four million-dollar lawsuit with Interfirst Bank in Texas for $500,000. [App. A86-A90] Appellant's financial statement of March 31, 1987 clearly reflected a $500,000 contingent liability for civil disputes. [App. A122-A128]

Even though appellant was unable to begin making payments in May, as was called for in the settlement agreement, [App. A88] no other conclusion could be reached except that appellant believed he could settle the judgement at any time with the payment of the $500,000 reflected on his March 31, 1987 financial statement. The literal truth was that there actually were no substantial changes.

This No Substantial Changes statement is not a banking form. It is not a legal form. It was not prepared by an accountant or by a lawyer. It was simply a statement made by appellant that, in his opinion, there had been no substantial changes.

When appellant provided the institution with the No Substantial Changes statement, he did so knowing that under no circumstance could his personal financial situation effect

the institution's exposure on the loan in question. Mr. McClure clearly testified that the two million-dollar judgment could not have affected the institution's lien in any way. [App. A72]

The government must prove that appellant willfully and knowingly made a false statement with intent to influence the institution in granting him a loan. United States v. Rapp, 871 F.2d 957 (11th Cir. 1989). Here, all the evidence shows is that appellant made a hurried and perfunctory statement that there had been no substantial changes since the preparation of his March 31, 1987 financial statement, some six months before. The institution could have required completely new financial statements, the institution knew of judgments, the institution knew of law suits, but they chose to push forward because they were in a hurry. They were in such a hurry that they abandoned appellant's loan request and foreclosed on the property.

The mere fact that the loan application or financial statement was submitted to the institution and may have been incomplete or inaccurate is not sufficient, appellant must have had the intent to influence the institution in making the loan. United States v. Krown, 675 F.2d 46 (2nd Cir. 1982).

On the issue of intent, evidence of repayment of the loan is relevant. United States v. Bell, 535 F.2d 886 (5th Cir. 1976). Restitution is also a relevant consideration on the issue of intent. United States v. Duncan, 598 F.2d 839 (4th Cir.), cert. denied, 444 U.S. 871, 100 S.Ct. 148 (1979).

This loan was in default, it was not a loan to appellant. Appellant had absolutely no responsibility or liability with respect to this loan. Appellant brought the loan current by paying the past due interest and attempted to take over the loan. The government may argue he did so with intent to derive a profit from a possible later sale, however there is no evidence to support this argument.

From the evidence however, no other conclusion can be reached except that appellant was merely attempting to help the institution. There can be no other explanation for

appellant's generous and gratuitous payment of the institution's deficiency once the property was sold through foreclosure on the courthouse steps. It can not be argued that appellant paid the $7,700 deficiency for any other purpose than to help the bank and perhaps his ex-employee.

It can not be argued that he did it to avoid prosecution. Mr. Bond testified that he was the officer in charge of investigating appellant and that he never even heard of appellant until 1989. [App. A73] Appellant paid the $7,700 in 1988.

Both Ms. Gallion and Mr. Stacy admit that appellant could not have cheated the institution out of anything in this matter. Ms. Gallion concluded her testimony with the following:

> Q. Okay. Let me ask you a question. Does it appear to you that Mr. Curtis (appellant) was trying to cheat the bank out of any money in these transactions?
>
> A. No, it does not. [App. A56-A57]

Mr. Stacy's cross examination ending with the following:

> Q. Okay. I understand that's a statement, but it's not an answer to my question. I want to know how he could have cheated the bank out of any money. He's not on trial for the Keswick venture. He's not on trial for that. He's only on trial for trying to cheat the bank out of, out of $112,000; okay? So tell us how he could have cheated the bank out of $112,000.
>
> A. I don't think he could have. [App. A66-A67]

The mens rea in a section 1014 case is not complete by a showing that a statement was merely untrue or inaccurate. The statement must be made with knowledge of its falsity and with intent to influence. The good faith defenses set out in bank fraud cases such as United States v. Goss, 650 F.2d 1336, (5th Cir. 1981), apply to section 1014 cases also, as good faith would eliminate any fraud or willfulness and would be an absolute defense.

In recent Fourth Circuit cases on sentencing, United States v. Baum, 974 F.2d 496 (4th Cir. 1992); and United States v. Rothberg, 954 F.2d 217 (4th Cir. 1992); this Court has consistently referred to the alleged conduct as "fraudulent conduct."

There is no evidence of fraud here, no evidence of willfulness, and no evidence of appellant's intent that the institution rely on false statements.

In the recent Fifth Circuit case of United States v. Beuttenmuller, 29 F.3d 973 (5th Cir. 1994), the facts are different but the application is very similar.

> "Throughout this case the government has, rather vehemently, argued that this complex real estate transaction was fraught with illegal conduct... The only thing these parties had no right to do was violate any statute, regulation, or law in the process. The government has failed to prove beyond a reasonable doubt, however, that these parties violated any statute, regulation, or law."

This was essentially a perfectly harmless transaction where appellant tried to take over a loan that was in default as a favor to a financial institution and an ex-employee, but he was unable to do so. The property was sold on the courthouse steps for $114,000, an amount greater than the face value of the loan, which was $112,000, but the institution had $7,700 in

out-of-pocket expenses associated with closing costs, attorney fees, and additional back interest. Even though he had no duty or responsibility to do so, appellant paid the deficit, so that the financial institution would have no loss on the transaction.

The government has taken this transaction, which had been completed and forgotten for years, with no loss to the financial institution, and literally created this section 1014 case.

Sufficient evidence does not exist by which a reasonable jury could find beyond a reasonable doubt that appellant knowingly and willfully made a false statement to a financial institution with intent that the financial institution be influenced by it in any way.

CONCLUSION

The petition for a writ of certiorari should be granted.

THOMAS J. CURTIS, JR.
APPELLANT

BY: _____

R.P. CORNELIUS
Counsel of Record
440 LOUISIANA
SUITE 1515
HOUSTON, TEXAS 77002
(713) 237-8380
Counsel for Petitioner